

ADR in New Mexico

An Introductory Overview

Part I – Origins
Part II – Confusion
Part III - Today

Slideshow Handout

Program Format.

- PowerPoint slideshow video.
- One video for each Part.
- Narration provides summary information.
- Printed slides provide reference for details.
- Running time: Part I, 11:40; Part II, 8:31; and Part III, 6:54.

One View Among Many.

I was fortunate to be a part of the history presented here, as an attorney, a mediator, a court administrator, and a member of many initiatives. ADR in New Mexico has been blessed with a remarkable and dedicated ADR community and is a truly collaborative effort. My view is only one perspective among many.


David Levin

Presenter's Note.

We are all on the adventure of transitioning to online learning. This presentation is a first-generation experiment. The purpose to convey information and to tryout making a video from a laptop computer. The format is simple, a PowerPoint slideshow with a voiceover narration. The goal is limited, get the basics down and leave the development of more exciting videos for later. Please watch with this understanding in mind.

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Part I - Origins

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One view among many...

I was fortunate to be a part of the history presented here, as an attorney, a mediator, a court administrator, and a member of many initiatives.

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ADR in New Mexico

Part I - Origins

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1980s

Bernalillo County was the site of many simultaneous ADR developments:

- Community mediation organizations flourished.
- Court-connected ADR programs were started.
- Statewide ADR professional organizations were established.
- School of Law, University of New Mexico, established basic mediation training course.

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Community Mediation

Community Mediation Organizations included:

- Albuquerque Mediation Center
- Mediation Alliance
- New Mexico Center for Dispute Resolution

Community Mediation Services:

- Primarily used a facilitative style, where mediators facilitate a discussion to **help the parties find their own solutions.**
- Mediator qualifications did not require being an attorney.

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Settlement Facilitation

Second Judicial District Court Settlement Facilitation

- "Settlement Week" began where attorneys and other professionals volunteered to help settle civil or family cases.
- Trials stopped for the week.
- Pairs of settlement facilitators met with parties for a half day to work on settlement.
- **Settlement facilitators were expected to evaluate** the strength and weaknesses of a party's position and to help the party to have realistic expectations regarding possible outcomes.

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Non-Binding Arbitration

Second Judicial District Court Arbitration

- All civil cases, where a claim is for \$25,000 or less, are mandatorily referred to non-binding arbitration.
- Every attorney in Bernalillo County with five years of practice or more is required to serve in the pool of arbitrators.
- Arbitrators receive an honorarium of \$100 per case.
- **Arbitrator makes an award.**
- Parties can accept award or appeal. On appeal, a trial before the assigned district court judge is automatic.

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Child Custody Mediation

Second Judicial District Court Child Custody Mediation

- Child custody cases may be referred to the Second District's Court Clinic for mediation.
- Mediation is primarily facilitative, where mediators facilitate a discussion to **help the parties find their own solutions, although parental education may be provided.**
- Mediators are mental health/family counselors employed as staff by the court.
- Parties attend mediation without their attorneys being present.

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Small Claims Civil Mediation

Metropolitan Court Civil Mediation

- Any civil case, where the claim is for \$10,000 or less, may be referred to mediation.
- Mediation is facilitative.
- Mediators are volunteers.
- Mediator qualifications do not require being an attorney.
- Mediation program has full time court staff.

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Law School Mediation Training

School of Law, University of New Mexico, began a basic mediation training course.

- The training was based upon a facilitative model.
- The instructors, Michelle Hermann and Mark Bennett, published "The Art of Mediation," a nationally recognized basic mediation text.
- The materials and methods of the training course provided a core foundation for basic mediation trainings in New Mexico thereafter.

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Professional Organizations

ADR professional organizations were established.

- **New Mexico Mediation Association**, which includes attorneys and non-attorneys.
- **Alternative Dispute Resolution Committee**, New Mexico State Bar. Membership is primarily attorneys but does include non-attorneys.

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Summary of ADR Styles

- Facilitative.** Mediator **facilitates** discussion between the parties to help them discover their own possible resolutions for their conflict.
 - Community Mediation, Child Custody Mediation, and Small Claims Civil Mediation.
- Evaluative.** Mediator, usually an attorney and/or another professional, **evaluates** the strengths and weaknesses of each position party's position and the possible litigation outcomes to help the parties settle.
 - Settlement Facilitation
- Determinative.** Arbitrator **decides** outcome.
 - Non-binding Arbitration

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Statewide Impact

- **District courts** adapted the Second Judicial District programs for their own use.
- **Magistrate courts** began mediation programs based upon the Metropolitan Court model.
- **Statutes, local rules, and supreme court rules** developed related to these innovative programs.
- Courts began to **assign court staff** to administer ADR programs.

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Statewide Impact (2)

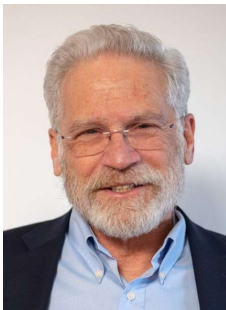
- Year-round settlement facilitation** programs were added in the Second and many other courts.
 - Year-round settlement facilitators are **paid**.
- Attorneys** set-up private settlement facilitation practices.
 - Private settlement facilitators are **paid**.
- Judges** began to refer parties to settlement facilitation.
 - Settlement facilitation was encouraged **before setting a case for trial**.

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The 1980s Blueprint

- The 1980s created the blueprint for ADR in New Mexico. A blueprint which underlies ADR in New Mexico today.**
 - **Prototype programs emerged.**
 - **ADR styles were developed.**
 - **Professional organized were established.**
 - **ADR became mainstream.**

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Part II - Confusion

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Part I - Origins

- Two popular ADR programs emerged from Bernalillo County during the 1980s:**
 - Settlement Facilitation
 - Mediation

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Program Profiles Simplified

Settlement Facilitation.

- Attorneys evaluated cases to help settlement.

Mediation Facilitation.

- Community mediators helped parties discuss settlement.

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Legacy

Settlement facilitation and mediation programs have had a profound impact on ADR in New Mexico.

- Prototype effective ADR programs.
- Tension between settlement facilitators and mediators.

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Part II - Confusion

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Two Traditions Stereotyped

Settlement Facilitation

Roots in the Courthouse

- Attorneys
- Paid
- Evaluative

Mediation

Roots in the Community

- Non-Attorneys
- Volunteers
- Facilitative

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Two Traditions Stereotyped (2)

Settlement Facilitation

- Just the facts and the law
- Shuttle format
- Positions
- Strengths and weaknesses
- Cost benefit analysis
- Result focused

Mediation

- Facts, law, and emotions
- Joint session format
- Positions
- Needs and interests
- Mutual solutions
- Process focused

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Two Traditions Stereotyped (3)

Settlement Facilitation

- Rules and statutes with "settlement facilitation" label
- "I am a mediator"
- "This is the right way"

Mediation

- Rules and statutes with "mediation" label
- "I am a mediator"
- "This is the right way"

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Confusion

The two traditions have different vocabularies.

- **Mediators** use the labels, “settlement facilitation” and “mediation,” interchangeably to describe their services.
- **Programs** use the labels inconsistently to describe their services.
- **Statutes and rules** use the labels inconsistently.

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Truth Be Told

Same service, different historical styles.

- “Settlement Facilitation” and “Mediation” are **both mediation**, each with a different style.
- “**Settlement Facilitation**” is mediation with a more evaluative style.
- “**Mediation**” is mediation with a more facilitative style.
- Evaluative and facilitative are two of the many styles of mediation such as transformative, narrative, and others.

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Actual Practice

Evaluative and facilitative are two of the many styles of mediation. Other styles include transformative, determinative, and narrative.

- **Mediation styles** overlap and the distinctions between styles are often blurred.
- **A mediator** may use different styles and combinations of styles as needed.
- **A program** may have its own individual preferred set of styles.

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New Mexico Guidelines For Court-connected Mediation Services

GUIDELINE II. Definitions...

B. “Mediation” means a process in which a mediator:

1. **facilitates communication and negotiation** between parties to assist them in reaching a voluntary agreement regarding their dispute; or
2. **promotes reconciliation, settlement, or understanding** between and among parties.

Mediation Procedures Act, §44-7B-2(A), uses the same definition.

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New Mexico Guidelines For Court-connected Mediation Services (2)

Guideline II, Commentary...

- The term “mediation” is broad.
- Throughout the nation the **term encompasses many methods, sometimes known as styles**, for the practice of mediation. The range of methodology includes **facilitative, evaluative, transformative, and other approaches, as well as combinations** of approaches.
- The **format for mediation also has a wide range of possibilities**, including joint session based mediation, shuttle diplomacy, time limited dispute resolution sessions, and many more.

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New Mexico Guidelines For Court-connected Mediation Services (3)

Guideline II, Commentary...

The definition of “mediation” in these Guidelines encompasses both mediation and settlement facilitation, the terms commonly used in New Mexico to describe mediation services. Although some view mediation and settlement facilitation as different processes and formats, **the national consensus is that they both fall within the single term of “mediation.”**

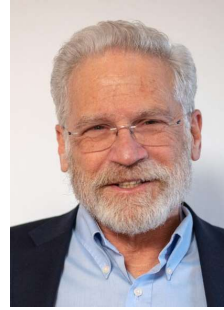
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Challenge

New Mexico has a challenge.

- **Mediation encompasses both** New Mexico traditions, settlement facilitation and mediation.
- Programs, practitioners, rules, statutes, and the public are **confused by the perceived "differences"** between the two traditions,
- The **traditional labels**, "settlement facilitation" and "mediation," are used interchangeable and inconsistently, and cause tension and conflict.
- There is **a need to reconcile the differences** and to create a common, working understanding and vocabulary regarding methods and styles of ADR.

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Part I – Origins

Court-Connected ADR programs emerged from Bernalillo County during the 1980s.

- Settlement Facilitation
- Mediation
- Child Custody Mediation
- Non-Binding Arbitration

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Part II - Confusion

"Settlement facilitation" and "mediation," are both forms of mediation. However, each had a different set of roots.

- Settlement facilitation originated from the courts and the legal community.
- Mediation originated from community mediation organizations.
- Each set of roots had different styles, formats, vocabularies, and compensation.

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Part II – Confusion (2)

The different origins created stereotypes, which remain active today.

- Settlement facilitators are evaluative, paid, and usually attorneys.
- Mediators are facilitative, volunteers, and usually non-attorneys.

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Part III - Today

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Present Status of ADR

- **ADR has a growing presence** throughout the state in business, state government, the judiciary, and other public and private sectors.
- ADR has become an integral part of the **practice of law**; attorneys represent clients in ADR settings and also provide ADR services.

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Present Status of ADR (2)

- **Settlement facilitation, child custody mediation, and small claims civil mediation** programs have grown.
- **Non-binding arbitration** continues in the Second District Court.
- **New programs**, including Children’s Court mediation, foreclosure mediation, eviction mediation, workplace mediation by the ADR Bureau, continue to be established
- **Statutes have been enacted**, including the Mediation Procedures Act, the Domestic Relations Mediation Act, and the Governmental Dispute Resolution Act.

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Supreme Court ADR Commission

- The New Mexico Supreme Court commissioned a comprehensive study** of past, present, and future ADR in the New Mexico Judiciary.
- On April 15, 2011, the **National Center for State Courts** issued, “Advancing Alternative Dispute Resolution in the New Mexico Judiciary: Key Strategies to Save Time and Money, Final Report.”
 - **The Final Report** contained a wealth of history, a thorough inventory of existing judicial ADR initiatives, and an invaluable analysis of the potential of ADR in the New Mexico.

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Supreme Court ADR Commission (2)

- The Final Report** contained “ten ways to advance court-annexed ADR in New Mexico.”
- Recommendation #1 called for a Supreme Court ADR Commission to develop, organize, and monitor ADR programs throughout New Mexico’s courts.
 - On August 1, 2011, the New Mexico Supreme Court established the Statewide Alternative Dispute Resolution Commission.
 - **The Commission remains active today.**

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Challenges

- The **schism remains** between paid attorney mediators and volunteer non-attorney mediators - although often attorneys do volunteer and non-attorneys are sometimes paid.
- The **confusion remains** between settlement facilitation and mediation.
- **Access to justice** for all New Mexicans is a growing concern.
- The **flood of self-represented litigants** poses serious new issues.
- **Public and private economic resources** are limited and stretched.

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Opportunities

- The best has yet to come.**
- This presentation is only an introductory overview. ADR in New Mexico, past and present, is a deep and wide field.
 - The full potential ADR for New Mexico lies ahead. Be open to the possibilities.
 - Help bring a full array of methods of dispute resolution to the people of New Mexico.

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